

**In re: CALZADO LEON.  
P.Q. Docket No. 99-0037.  
Decision and Order filed August 29, 2000.**

**Default – Failure to file timely answer – Avocados – Federal Register constructive notice – Civil penalty – Sanction policy.**

The Judicial Officer affirmed the Default Decision issued by Chief Administrative Law Judge James W. Hunt (Chief ALJ) concluding the Respondent moved five boxes of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee, in violation of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff and assessing the Respondent a \$500 civil penalty for the violations. The Judicial Officer held the Respondent's lack of understanding of the risk of the spread of plant pests associated with the movement of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee, and the Respondent's lack of intent to spread plant pests are not defenses to the Respondent's violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff. The Judicial Officer also held the Respondent was constructively notified of the prohibition on the movement of Mexican Hass avocados to Tennessee by the publication of the prohibition in the *Federal Register*.

James D. Holt, for Complainant.

Respondent, Pro se.

Initial decision issued by James W. Hunt, Chief Administrative Law Judge.

*Decision and Order issued by William G. Jenson, Judicial Officer.*

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on April 29, 1999. Complainant instituted this proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act]; the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act (7 C.F.R. §§ 301.11(b) and 319.56-2ff); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Complaint alleges that on or about December 22, 1998, Calzado Leon [hereinafter Respondent] moved five boxes of Mexican Hass avocados from Chicago, Illinois, to Calzado Leon, Nashville, Tennessee, in violation of 7 C.F.R. §§ 301.11(b)(2) and 319.56-2ff (Compl. ¶ 2).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on May 6, 1999.<sup>1</sup> Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On April 12, 2000, in accordance with section 1.139 of the Rules of Practice

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<sup>1</sup>See Domestic Return Receipt for Article Number P 093 175 035.

(7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order and a Proposed Decision and Order. The Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Decision and Order, Complainant's Proposed Decision and Order, and a service letter on April 24, 2000.<sup>2</sup> Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order within 20 days after service of Complainant's Motion for Adoption of Proposed Decision and Order and Complainant's Proposed Decision and Order, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On June 6, 2000, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] issued a Decision and Order [hereinafter Initial Decision and Order]: (1) concluding that on December 22, 1999, Respondent moved five boxes of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee, in violation of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff; and (2) assessing Respondent a \$500 civil penalty (Initial Decision and Order at 2, 4-5).

On July 12, 2000, Respondent appealed to the Judicial Officer. The Hearing Clerk served Complainant with Respondent's appeal petition on July 20, 2000.<sup>3</sup> Complainant failed to file a response to Respondent's appeal petition within 20 days after service of the appeal petition, as required by section 1.145(b) of the Rules of Practice (7 C.F.R. § 1.145(b)). On August 25, 2000, the Hearing Clerk transmitted the record of this proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order, except I find Respondent moved five boxes of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee, on or about December 22, 1998. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the Initial Decision and Order as the final Decision and Order with minor modifications to reflect my disagreement with the Chief ALJ regarding the date of Respondent's violations. Additional conclusions by the Judicial Officer follow the Chief ALJ's Discussion, as restated.

## **APPLICABLE STATUTORY AND REGULATORY PROVISIONS**

7 U.S.C.:

### **TITLE 7—AGRICULTURE**

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<sup>2</sup>See Domestic Return Receipt for Article Number P 093 175 219.

<sup>3</sup>See letter dated July 14, 2000, from the Hearing Clerk to Respondent filed at 11:20 a.m., July 20, 2000.

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## CHAPTER 7B—PLANT PESTS

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### § 150gg. Violations

....

#### (b) Civil penalty

Any person who—

(1) violates section 150bb of this title or any regulation promulgated under this chapter[]

....

may be assessed a civil penalty by the Secretary not exceeding \$1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

....

**CHAPTER 8—NURSERY STOCK AND OTHER PLANTS  
AND PLANT PRODUCTS**

....

**§ 163. Violations; forgery, alterations, etc., of certificates; punishment;  
civil penalty**

... Any person who violates any ... rule[] or regulation [promulgated by the Secretary of Agriculture under this chapter] ... may be assessed a civil penalty by the Secretary not exceeding \$1,000. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. §§ 150gg(b), 163.

7 C.F.R.:

**TITLE 7—AGRICULTURE**

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**SUBTITLE B—REGULATIONS OF THE DEPARTMENT  
OF AGRICULTURE**

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**CHAPTER III—ANIMAL AND PLANT HEALTH  
INSPECTION SERVICE,  
DEPARTMENT OF AGRICULTURE**

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**PART 301—DOMESTIC QUARANTINE NOTICES**

**SUBPART—IMPORTED PLANTS AND PLANT PARTS**

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**§ 301.11 Notice of quarantine; prohibition on the interstate movement  
of certain imported plants and plant parts.**

(a) In accordance with part 319 of this chapter, some plants and plant parts may only be imported into the United States subject to certain destination restrictions. That is, under part 319, some plants and plant parts may be imported into some States or areas of the United States but are prohibited from being imported into, entered into, or distributed within other States or areas, as an additional safeguard against the introduction and establishment of foreign plant pests and diseases.

(b) Under this quarantine notice, whenever any imported plant or plant part is subject to destination restrictions under part 319:

....

(2) No person shall move any plant or plant part from any such quarantined State or area into or through any State or area not quarantined with respect to that plant or plant part.

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## PART 319—FOREIGN QUARANTINE NOTICES

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### SUBPART—FRUITS AND VEGETABLES

#### QUARANTINE

....

#### **§ 319.56-2ff Administrative instructions governing movement of Hass avocados from Mexico to the Northeastern United States.**

Fresh Hass variety avocados (*Persea americana*) may be imported from Mexico into the United States for distribution in the northeastern United States only under a permit issued in accordance with § 319.56-4, and only under the following conditions:

(a) *Shipping restrictions.* . . .

....

(3) The avocados may be distributed only in the following northeastern States: Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin.

....

(c) *Safeguards in Mexico.* . . .

....

(3) *Packinghouse requirements.* The packinghouse must be registered with Sanidad Vegetal's avocado export program and must be listed as an approved packinghouse in the annual work plan provided to APHIS by Sanidad Vegetal. The operations of the packinghouse must meet the following conditions:

....  
(vii) The avocados must be packed in clean, new boxes. The boxes must be clearly marked with the identity of the grower, packinghouse, and exporter, and the statement "Distribution limited to the following States: CT, DC, DE, IL, IN, KY, ME, MD, MA, MI, NH, NJ, NY, OH, PA, RI, VA, VT, WV, and WI."

7 C.F.R. §§ 301.11(a), (b)(2), 319.56-2ff(a)(3), (c)(3)(vii).

**CHIEF ADMINISTRATIVE LAW JUDGE'S  
INITIAL DECISION AND ORDER  
(AS RESTATED)**

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the Complaint are adopted as Findings of Fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

**Findings of Fact**

1. Respondent is a business with a mailing address of 995 Thompson Place, Nashville, Tennessee 37217.
2. On or about December 22, 1998, Respondent moved five boxes of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee.

**Conclusion of Law**

By reason of the facts contained in the Findings of Fact, Respondent violated the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff.

**Discussion**

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9<sup>th</sup> Cir. 1993) (not to be cited as precedent under 9<sup>th</sup> Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The success of the programs designed to protect United States agriculture by the prevention, control, and eradication of plant pests is dependent upon the compliance of businesses, such as Respondent, with the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act. A failure to comply with Federal regulations designed to prevent the spread of plant pests greatly increases the risk of the spread of plant pests. The imposition of sanctions in cases, such as this case, is extremely important to the prevention of the spread of plant pests. Sanctions must be sufficiently substantial to deter the violator and other potential violators from future violations of the Plant Quarantine Act, the Federal Plant Pest Act, and the regulations issued under the Plant Quarantine Act and the Federal Plant Pest Act.

Respondent committed five violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff. A single violation of 7 C.F.R. §§ 301.11(b) and 319.56-2ff could cause losses of billions of dollars and eradication expenses of tens of millions of dollars. These circumstances suggest the need for a severe sanction to serve as an effective deterrent to future violations.

Complainant believes the assessment of a \$500 civil penalty against Respondent will deter Respondent and other potential violators from future violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff (Complainant's Motion for Adoption of Proposed Decision and Order at 13). Complainant's recommendation as to the appropriate sanction is entitled to great weight in view of the experience gained by Complainant during his day-to-day supervision of the regulated industry.

#### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

Respondent raises two issues in Respondent's July 5, 2000, letter to the Hearing Clerk [hereinafter Appeal Petition].

First, Respondent asserts it did not understand the risk of the spread of plant pests associated with the movement of Mexican Hass avocados from Chicago,

Illinois, to Nashville, Tennessee, and did not intend to spread plant pests (Appeal Pet.).

Respondent's lack of understanding of the risk of the spread of plant pests associated with the movement of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee, is not a defense to Respondent's violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff. Moreover, Respondent's lack of intent to spread plant pests is not a defense to Respondent's violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff.

Second, Respondent asserts it did not have sufficient information about 7 C.F.R. §§ 301.11(b) and 319.56-2ff (Appeal Pet.).

The regulations prohibiting the movement of Mexican Hass avocados to Tennessee are published in the *Federal Register*; thereby constructively notifying Respondent of the prohibition on the movement of Mexican Hass avocados from Chicago, Illinois, to Nashville, Tennessee.<sup>4</sup> Therefore, Respondent's lack of actual knowledge of 7 C.F.R. §§ 301.11(b) and 319.56-2ff is not a defense to Respondent's violations of the Plant Quarantine Act, the Federal Plant Pest Act, and 7 C.F.R. §§ 301.11(b) and 319.56-2ff.

For the foregoing reasons, the following Order should be issued.

### **Order**

Respondent is assessed a \$500 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture  
APHIS Field Servicing Office  
Accounting Section  
P.O. Box 3334  
Minneapolis, Minnesota 55403

The certified check or money order shall be sent to, and received by, the United

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<sup>4</sup>See *FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2<sup>d</sup> Cir. 1994); *United States v. Wilhoit*, 920 F.2d 9, 10 (9<sup>th</sup> Cir. 1990); *Jordan v. Director, Office of Workers' Compensation Programs*, 892 F.2d 482, 487 (6<sup>th</sup> Cir. 1989); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F.2d 117, 122 n.4 (6<sup>th</sup> Cir. 1988); *Government of Guam v. United States*, 744 F.2d 699, 701 (9<sup>th</sup> Cir. 1984); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7<sup>th</sup> Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10<sup>th</sup> Cir. 1976); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam); *Ferry v. Udall*, 336 F.2d 706, 710 (9<sup>th</sup> Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).



States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to P.Q. Docket No. 99-0037.

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